FOR ARGUMENT

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Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1810

CITY OF LOS ANGELES, DEPARTMENT OF WATER AND POWER, *et al.*,

Petitioners,

—v.—

MARIE MANHART, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICI CURIAE OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS

MATTHEW W. FINKIN
General Counsel
American Association of
University Professors
Southern Methodist
University School of Law
Dallas, Texas 75275

RUTH BADER GINSBURG
SUSAN DELLER ROSS
KATHLEEN WILLERT PERATIS
MARJORIE MAZEN SMITH
BRUCE J. ENNIS
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Amici Curiae

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BRIEF AMICI CURIAE

Interest of Amici*

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 200,000 members dedicated to defending the right of all persons to equal treatment under the law. Recognizing that confinement of women's opportunities is a pervasive problem at all levels of society, public and private, the ACLU has established a Women's Rights Project to work toward the elimination of gender-based discrimination.

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* This brief is filed with consent of the parties. The letters of consent have been filed with the Clerk of the Court.

The American Civil Liberties Union has participated in virtually every case before this Court involving interpretation of Title VII's ban on sex discrimination. The Union acted as amicus curiae in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971), concerning an employer practice of refusing to hire mothers of preschool-age children; in *Wetzel* v. *Liberty Mutual Insurance Co.*, 511 F.2d 199 (3d Cir. 1975), *vacated on juris. grounds*, 424 U.S. 737 (1976), and *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), both concerning the Title VII rights of working women disabled by pregnancy; in *Dothard* v. *Rawlinson*, 97 S.Ct. 2720 (1977), allowing a narrow exception to sex-neutral hiring standards for prison guards in Alabama's brutal maximum-security penitentiaries; and in *Nashville Gas Co.* v. *Satty*, 46 U.S.L.W. 4026 (Dec. 6, 1977), striking down an employer practice of stripping female workers returning from childbirth leaves of job-bidding seniority.

The ACLU has also participated in most of the cases before this Court challenging sex-based discrimination under the Fifth and Fourteenth Amendments. Lawyers associated with the ACLU presented the appeal in *Reed* v. *Reed*, 404 U.S. 71 (1971), participated as counsel for the appellants and later represented amicus curiae in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), represented the appellant in *Kahn* v. *Shevin*, 416 U.S. 351 (1974), the appellees in *Edwards* v. *Healy*, 421 U.S. 772 (1975), *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), and *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), petitioners in *Struck* v. *Secretary of Defense*, 460 F.2d 1372 (9th Cir. 1971, 1972), *cert. granted*, 409 U.S. 947, *judgment vacated and case remanded for consideration of mootness*, 409 U.S. 1071 (1972), and *Turner* v. *Department of Employment Security*, 423 U.S. 44 (1975),

and acted as counsel for petitioners, appellants, appellees, and amicus curiae in this Court in several other gender discrimination and women's rights cases.

American Civil Liberties Union attorneys represent the plaintiffs in *Peters* v. *Wayne State University and TIAA-CREF*, Civ. Act. No. 6-70165 (E.D. Mich.), a Title VII challenge by female academic and non-academic employees and retirees to the University's provision, through TIAA-CREF, of lower periodic retirement benefits to women than to men. Trial has commenced in the *Peters* case, and amici will refer to portions of the transcript and discovery in that case. ACLU attorneys also represent women employed by Columbia University in academic and administrative positions who have filed a charge with the Equal Employment Opportunity Commission alleging sex discrimination in the provision of pension benefits by the University through TIAA-CREF.

The American Association of University Professors (AAUP) was founded in 1915 to advance the standards, ideals and welfare of teachers and research scholars in universities and colleges. It is the oldest and largest national association of its kind. The status of women in the academic profession has been a long-standing concern of the Association. Both the Annual Meeting and the Council of the Association have voted to support sex-neutral pension plans. These actions have provided the foundation for efforts by Association officers and members, through discussion and correspondence with officers of pension funds and government officials, to seek the establishment of non-discriminatory pension plans for academic men and women. For example, in the fall of 1975, the President of the AAUP wrote to the Secretary of Labor and to the Chairman of

TIAA-CREF, the annuity association to which a very substantial proportion of all AAUP members belong, to protest TIAA-CREF's use of sex-based actuarial tables to pay women lower retirement benefits than men as "exactly the kind of discriminatory conduct which Title VII forbids." On Equal Monthly Retirement Benefits for Men and Women Faculty, 61 AAUP Bulletin 316, 317 (1975). The AAUP therefore is well qualified to address the Court in the instant case.

Petitioner employer in this case defends its former practice of paying women employees less take-home wages than similarly-situated men on the ground that, "on the average," women live longer than men. Therefore, petitioners contend, women's pensions cost more than men's, and women's take-home pay is appropriately reduced so that each woman will bear her share of the "average extra" cost of women's pensions. The question here presented is whether this explicit classification by sex is compatible with the central anticategorical thrust of Title VII of the Civil Rights Act of 1964: the right of individuals to equal treatment without regard to their membership in a particular sex, race, religious or ethnic group. The answer to this question, amici believe, is of vital significance to the efficacy of Title VII and to the achievement of full equality between the sexes.

Opinions Below

The opinions of the United States Court of Appeals for the Ninth Circuit are reported at 553 F.2d 581 (1976). The opinion of the District Court for the Central District of California is reported at 387 F. Supp. 980 (1975).

Statutes and Regulations Involved

Sections 703(a) and (h) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a) (1974) (hereinafter "Title VII"), in pertinent part provide:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . .; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . .
>
> • • • • •
>
> (h) . . . . It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206 (d) of Title 29.

Section 6(d) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §206(d) (1965) (hereinafter "Equal Pay Act") in pertinent part provides:

> (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than

the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Sections 1604.9(a), (b), (e), and (f) of the Equal Employment Opportunity Commission (EEOC) Sex Discrimination Guidelines, 29 C.F.R. §§1604.9(a), (b), (e), and (f) in pertinent part provide:

(a) "Fringe benefits," as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment.

(b) It shall be an unlawful employment practice for an employer to discriminate between men and women with regard to fringe benefits.

(e) It shall not be a defense under title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

(f) It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex.

Sections 800.116(d) and 800.151 of the Department of Labor Wage and Hour Administrator's Interpretive Bulletin on Equal Pay for Equal Work, 29 C.F.R. §§800.116(d) and 151 provide:

116(d)—If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees.

151—A wage differential based on claimed differences between the average cost of employing the employer's women workers as a group and the average cost of employing the men workers as a group does not qualify as a differential based on any "factor other than sex," and would result in a violation of the equal pay provisions, if the equal pay standard otherwise applies. To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purposes of the Equal Pay Act. Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex under similar working conditions in jobs requiring equal skill, effort, and responsibility.

Question Presented

Does Title VII of the 1964 Civil Rights Act prohibit an employment policy of paying all female workers less than all similarly-situated male workers, justified by the employer on the ground that "on the average" women live longer than men and therefore it costs more "on the average" to provide pension benefits to women, when: (1) the policy classifies employees on the basis of "gender as such"; (2) the great majority of women do not outlive similarly-situated men; (3) the policy runs counter to the remedial purpose of Title VII; and (4) the policy is based on insurance industry custom and is not essential to the business requirements of either the employer or insurers.

Statement of the Case

Amici incorporate the Statement of the Case set out in Brief for Respondents.

Summary of Argument

I.

Solely on the basis of their sex, women employed by petitioner Water Department received less in take-home wages than all similarly-situated men. The Water Department asserts women live longer "on the average" than men; as a result, women's pensions costs more "on the average" than men's; therefore every woman worker must be paid less in individual wages to cover part of the "average extra" cost of women's pensions. This position, focusing insistently on the "average," cannot be reconciled with the

individualistic, anti-categorical premises underlying Title VII.

The policy petitioners champion conflicts head-on with Section 703(a)'s bar to classification based on "gender as such." The conflict cannot be avoided by arguing male and female employees do not have "like qualifications." For the great majority of men and women (some 84%) share common death ages and thus are similarly situated with respect to compensation entitlement. To give 84 percent of the Water Department's female employees, women identically situated to 84 percent of the male employees, lower take-home pay is the essence of the discrimination prohibited by Section 703(a). The majority of women are penalized because a class stereotype or average, to which *most* women do not conform, is nevertheless applied to all women.

The central purpose of Title VII is to afford *individuals* equal treatment. This purpose is thwarted when the characteristics of some women are attributed to all, or when women "as a class" are compared to men "as a class." The concept of equal treatment for individuals without regard to group characteristics is incorporated in the EEOC's Guidelines, and has been applied by a number of federal courts to prohibit sex-based distinctions in retirement programs.

Finally, the policy at issue here, and the similar one of paying women lower retirement benefits, run counter to the remedial purposes of Title VII. As Congress noted, working women are economically disadvantaged compared to men; retired women are similarly disadvantaged, in large part because of prior wage and job discrimination.

To allow an additional, explicitly sex-based, lowering of either women's take-home wages or retirement benefits would heap on a further disadvantage, in conflict with the plain meaning of Section 703(a) and the grand design of Title VII.

II.

Because the policy of paying women less in take-home wages than men is unavoidably an explicit sex-based classification in *prima facie* violation of Section 703(a), the Water Department has the burden of establishing a defense.

The Water Department and the insurance amici defend the discriminatory practice at issue not on the basis of the *employer's* business requirements, but on the basis of the long-standing insurance industry practice of measuring mortality on a sex-segregated basis. This insurance custom creates neither a "business necessity" nor a Section 703(e) "bona fide occupational qualification" defense for an employer.

Without even attempting to establish any employer "business necessity," insurance amici press, solely for gender lines, the insidious argument that Title VII requires only "actuarial equality" when the relevant characteristic (here, longevity) is impossible to determine on an individual basis. Their arguments fall into four categories: cost; insurer's reliance on group-based experience; equity and risk classification; and adverse selection.

As to the only employer-related defense, cost, there is no claim that the relatively small additional cost to the Department affects its ability effectively to carry out its

function of providing water and power to the City of Los Angeles. Moreover, in light of Title VII's purpose of raising the economic status of women by eliminating discrimination in jobs and compensation, it would be perverse to justify continued lower wages or retirement benefits for women on the ground that it costs more to pay them equally with men. Compliance with Title VII was not intended to be cost-free.

Nor do any of the insurance industry arguments justify departing from the anticategorical precepts of Title VII. The insurance amici stress that insurers must use groups, and that longevity is impossible to determine by individual testing. But insurers can pool the mortality experience of men and women, just as they pool mortality experience for all other groups with different average longevity rates. For example, insurers have discontinued reliance on grouping by race, reliance once considered "dictated entirely by actuarial findings." In sum, the insurance industry cannot maintain persuasively that sound pension plans depend on sex classification, any more than they depend on race classification or classification based on a host of health and environmental factors insurers choose not to use in group insurance contexts.

Insurance amici further argue that it would be inequitable to men to pay women equal take-home pay and retirement benefits, because this would result in men subsidizing women's benefits. But group insurance would be impossible unless one class subsidized another. Moreover, in group plans, refined classification is neither necessary nor appropriate because the insurer is guaranteed a cross-section of risks. Amici have thus exaggerated the importance of equity in the group-plan context. In short, the business

purpose advanced, equity, is unconvincing as an excuse for sex classification in a group plan that uses no other classification apart from age. The related contention that elimination of sex segregation requires males to subsidize females is no more accurate than a charge that equal pension benefits for blacks and whites means blacks subsidize whites. Acceptance of the argument would stand Title VII on its head. Women could sue if they were not accorded higher life insurance benefits, blacks, if they were not accorded higher pension benefits.

Finally, the suggestion that if men are forced to subsidize women's risks, the "subsidizers" will leave the pool, occasioning the eventual collapse of insurance schemes, is based on layers of distortion and speculation, not on fact.

III.

Petitioners and supporting amici argue that the part of Section 703(h) of Title VII known as "the Bennett Amendment" provides a defense to their violation of Section 703 (a). Their argument is threefold: (1) the Bennett Amendment allows use of non-sex-based factors in setting compensation differentials, and paying women less take-home pay than men is not based on sex, but on longevity; (2) a Humphrey-Randolph colloquy indicates a Congressional intent to allow discriminatory sex-based classifications in retirement plans; (3) the Bennett Amendment makes an Equal Pay Act interpretive regulation cited in *General Electric Co.* v. *Gilbert,* 429 U.S. 125 (1976), *i.e.,* 29 C.F.R. §800.116(d), controlling in Title VII discrimination cases.

All three arguments lack merit. The employer policy here is not based on a "factor other than sex"; it is based explicitly and solely on sex. The Humphrey-Randolph colloquy does not indicate a Congressional intent to allow gender lines which operate to the detriment of women workers. The interpretive regulation, by allowing sex-based differentials in wages, is contrary to the text of the Equal Pay Act and inconsistent with another Equal Pay Act regulation; indeed, the Labor Department itself retreated from the regulation by filing a brief in the Ninth Circuit urging that women are entitled under the Equal Pay Act to take-home pay equal to men's. Finally, the relevant EEOC regulations clearly prohibiting the employer practice here are entitled to deference under the Court's *Gilbert* standard.

IV.

The decision below accords with this Court's principal equal protection/gender classification decisions. Sex-averaging arguments strikingly similar to those pressed here were firmly rejected last Term in *Craig* v. *Boren,* 429 U.S. 190(1976), and *Califano* v. *Goldfarb,* 430 U.S. 199 (1977). These cases indicate that gender, like race, must not be used as a proxy for some other characteristic, attribute, or condition. To the extent Title VII calls for review more stringent than the Constitution requires, the rulings in *Craig* and *Goldfarb* make this an *a fortiori* case.

V.

Congressional authority under Section 5 of the Fourteenth Amendment and the Commerce Clause plainly supports application of Title VII's ban on sex classification to petitioner Water Department.

ARGUMENT

I.

Providing all female employees less take-home pay than all similarly-situated male employees because women "on the average" live longer than men violates Title VII of the 1964 Civil Rights Act.

A. *The Employer Policy at Issue Classifies Employees on the Basis of "Gender as Such" in Violation of Section 703(a) of Title VII.*

Solely on the basis of their sex, women employed by the Los Angeles Department of Water and Power received less in take-home wages than all similarly-situated men. The Water Department argues that women live longer "on the average" than men, that as a result women's pensions cost more "on the average" than men's pensions, and that it is therefore necessary to pay every woman worker less in individual wages in order to cover part of the "average extra" cost of women's pensions. This insistent focus on the "average" as sole justification for exclusively sex-based classification cannot be reconciled with the anticategorical premises underlying Title VII. That statute places stringent restraints on sex (or race) averaging, restraints that preclude the policy petitioner Water Department pursues.

The Water Department classifies all women employees in one group, to their economic disadvantage, and all men in another, to their economic advantage. This classification, explicitly based on "gender as such," violates Section 703 (a) of Title VII, 42 U.S.C. §2000e-2(a). *Compare Dothard* v. *Rawlinson,* 97 S.Ct. 2720 (1977), *and Phillips* v. *Martin Marietta Corp.,* 400 U.S. 542 (1971), *with General Electric Co.* v. *Gilbert,* 429 U.S. 125 (1976).

In *Gilbert,* the Court held that a disability program dividing potential recipients into two groups—"pregnant women and nonpregnant persons"—did not classify on the basis of "gender as such." Since there was a "lack of identity" between the excluded disability (pregnancy) and "gender as such," the program did not ". . . trigger . . . the finding of an unlawful employment practice under §703(a)(1)," 42 U.S.C. §2000e-2(a)(1).[1] *Gilbert, supra,* 429 U.S. at 136. In contrast, in *Dothard,* the employer's explicit sex classification, barring women from applying for a job open to men, triggered the Section 703(a) unlawful employment practice finding, a finding surmountable by the employer only upon establishing justification pursuant to the Section 703(e) BFOQ defense. As explained in *Phillips*:

> Section 703(a) of the Civil Rights Act of 1964 requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having preschool-age children.

Phillips, supra, 400 U.S. at 544.[2] The Water Department and its supporting amici seek to escape the Section 703(a) requirement by arguing, in essence, that male and female

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[1] Unlike pregnancy, long life or short is hardly an *additional* risk unique to women, relating to "their differing role in 'the scheme of human existence.'" *General Electric Co.* v. *Gilbert, supra,* 429 U.S. at 129 n.17. Rather, the issue here is appropriate treatment of a risk common to all human beings. *See* Note, 91 Harv. L. Rev. 241, 248-50 (1977).

[2] The notion pressed by petitioners (Brief at 19, 39) and amici TIAA-CREF (Brief at 11, 15) that a "rational basis" for sex (or race) classification is all a Title VII defendant need establish is remarkable in light of the Court's clear rulings to the contrary. No one contended in *Phillips* v. *Martin Marietta Corp.,* 400 U.S. 542 (1971), for example, that the sex classification was "irrational."

(footnote continued on following page)

employees do not have "like qualifications" for equal take-home pay because "women outlive men." Petitioners' Brief at 4.

Petitioners' argument dissembles. As the district court noted in *Henderson* v. *Oregon,* 405 F. Supp. 1271, 1275 n. 5 (D. Ore. 1975), *appeal docketed,* No. 76-1706 (9th Cir. March 30, 1976):

> The great majority of men and women—84 percent—share common death ages. That is, for every woman who dies at 81 there is a corresponding man who dies at 81. The remaining 16 percent are women who live longer than the majority and men who live shorter. As a result, each woman is penalized because a few women live longer and each man benefits because a few men die earlier.

Accord, Reilly v. *Robertson,* 360 N.E.2d 171 (Ind. S.C. 1977), *cert. denied,* 46 U.S.L.W. 3215 (Oct. 3, 1977); *Manhart* v. *City of Los Angeles,* 553 F.2d 581, 585 (9th Cir. 1977), *cert. granted,* 46 U.S.L.W. 3214 (Oct. 3, 1977).[3]

Quite the opposite. The United States, as amicus curiae, clarified at oral argument:

> We do not contend [a decision not to employ women who have children of preschool age] is irrational; we contend that it's illegal.
>
> . . .
>
> Many things that are illegal [under Title VII] may not be irrational.

Transcript of Oral Argument, December 9, 1970. *Accord, Dothard* v. *Rawlinson,* 97 S.Ct. 2720 (1977). Only slightly less remarkable is the failure of petitioners and their amici to notice that even under the constitutional standard, considerably more than rationality must be established to justify resort to gender as a classifying factor. *See Craig* v. *Boren,* 429 U.S. 190, 197 (1976); *Califano* v. *Goldfarb,* 430 U.S. 199, 209 n.8 (1977).

[3] In *Peters* v. *Wayne State University and TIAA-CREF,* Civ. Act. No. 6-70165 (E.D. Mich.), currently on trial, plaintiffs presented an expert, Dr. Gerald Martin, who had previously testified as an expert in *Reilly* v. *Robertson, supra.* He testified that he had examined the mortality tables used by TIAA-CREF, and had calculated the percentage of men and women sharing common death ages under these tables. Under the first set, he found an overlap of 79.5%; under the second, he found an overlap of 80.1%. Trial Transcript at 213 (Sept. 29, 1977).

The "great majority of men and women," the 84 percent who share common death ages, indisputably have "like qualifications"; as to compensation entitlement, they are similarly situated. Yet the great majority of women who do not outlive similarly-situated men are paid less because a relatively small number of women will live longer and a relatively small number of men will die earlier. To give 84 percent of all the Department's female employees, women identically situated to 84 percent of the male employees, lower daily and lifetime wages is the essence of the discrimination prohibited by Section 703(a). One factor, and one factor alone, differentiates the two groups: their sex. The women will work the same jobs, for the same number of years, and die at the same time after retirement as their male counterparts. Their economic needs will be no less than those of their male co-workers. Yet their take-home wages will be less, solely because they are women.

Thus, the majority of women are penalized because a class stereotype or average, one to which *most* women do not conform, is nevertheless applied to all women. "[I]t is impermissible under Title VII to refuse to hire an individual woman or man on the basis of stereotyped characterizations of the sexes." *Dothard* v. *Rawlinson, supra,* 97 S.Ct. at 2729.[4] It is similarly impermissible under

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[4] Stereotypes may accurately portray the *average* characteristics of women or men. For example, it is true that women on the average cannot lift as much weight as men on the average; yet courts

Title VII to pay an individual woman lower take-home wages than a similarly-situated man on the basis of a stereotype or average that inaccurately describes some 84 percent of the affected population.

The Water Department's insistence on comparing the class of women employees to the class of men employees misses the central thrust of Title VII: the right of *individuals* to equal treatment without regard to their class membership in a particular sex, race, religious, or ethnic group.[5] The EEOC has consistently taken this position in its guidelines regarding the BFOQ defense:

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have invalidated employer practices based on such statistically-valid averages because they penalize the individual woman or man who does not conform to the group average. *See Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971); *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969). Indeed, by definition, most people will not conform to an average. Sex (and race) stereotypes have been assailed under Title VII, not because they represent invalid statistical averages, but because they injure individuals who do not conform to them yet are treated as though they do.

[5] The Water Department and supporting amici contend that, in the insurance context, they may measure whether equality of treatment exists on the basis of what each sex-based group as a whole receives, rather than on the basis of what identically-situated individual men and women receive, citing *Gilbert* for this proposition. This argument entirely misconstrues *Gilbert*, as the Court's subsequent decision in *Nashville Gas Co.* v. *Satty*, 46 U.S.L.W. 4026 (Dec. 6, 1977), makes clear. In both cases, the Court was examining the possible discriminatory effect of a *neutral* policy, and of course had to resort to statistics on group impact in order to determine whether the policy in fact operated to discriminate on the basis of sex. Here, however, the policy is explicitly based on sex. Hence, group impact analysis is obviously inappropriate. The gender-based classification triggers a finding of a Section 703(a) violation, casting a burden of justification on the employer. *Dothard* v. *Rawlinson, supra; Phillips* v. *Martin Marietta Corp., supra.* Moreover, petitioners and amici should have paid closer attention to the text of the *Gilbert* opinion where coverage of the

> The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

29 C.F.R. §1604.2(a)(1)(ii).[6] As a consistent position of the EEOC, this guideline is entitled to weight; indeed, just last Term, the Court so held with respect to the full text of Section 1604.2(a).[7] *Dothard* v. *Rawlinson, supra,* 97 S. Ct. at 2729 n.19.

Nor is the concept of equal treatment for individuals without regard to group characteristics a new one in the retirement context. A number of federal courts have held Title VII prohibits sex-based distinction in retirement programs. In *Henderson* v. *Oregon,* 405 F. Supp. 1271 (D. Ore. 1975), *appeal docketed,* No. 76-1706 (9th Cir. March 30, 1976), Judge Praegerson invalidated a variant of the Water Department's retirement system—the payment of lower monthly retirement benefits to women. That ruling was made in the face of precisely the same "average longevity" argument advanced here.[8] *See also Reilly* v. *Robertson,*

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same breadth for analogous risks is indicated as the Title VII requirement. *Compare* TIAA-CREF Brief at 21, *with* Note, 91 Harv. L. Rev. 241, 248-50 (1977).

[6] Formerly numbered 29 C.F.R. §1604.1(a)(1)(ii), 30 Fed. Reg. 14927 (Dec. 2, 1965).

[7] Of course, the BFOQ defense is not available here. *See* I.B., *infra.*

[8] Two conflicting post-*Gilbert* district court decisions have issued on the legality of an "unequal benefits" retirement scheme similar to the one in *Henderson*: the program provided by TIAA-CREF (amici here) to numerous colleges and universities. *Peters* v. *Wayne State University and TIAA-CREF*, Civ. Act. No. 6-70165 (E.D. Mich. Sept. 21, 1977); *EEOC* v. *Colby College and TIAA-CREF*, 15 FEP Cases 1363 (D. Me. Nov. 17, 1977). In both cases, TIAA-CREF moved for summary judgment based upon this Court's

supra (lower monthly benefits for female retirees violates equal protection guarantees of the Indiana and Federal Constitutions).

Similarly, retirement programs that pay lower monthly benefits to male early-retirees have been found unlawful under Title VII.[9] *Chastang* v. *Flynn & Emrich Co.*, 541

Gilbert decision. Judge DeMascio denied the motion in *Peters*. Two months later, in *Colby College*, Judge Gignoux granted the motion. The *Colby College* decision, which relies exclusively on *Gilbert*, fails to note a critical distinction this Court has underscored: the *Gilbert* classification was "not gender-based" at all; the retirement classification at issue in *Colby* divided workers on the basis of "gender as such."

The *Peters* decision is attached hereto as an Appendix. The TIAA-CREF amici brief includes an addendum setting out the *Colby* decision, but fails to mention *Peters*.

[9] This practice also drew support from the use of sex-segregated mortality tables, although that fact is not discussed in the decisions. Retirement at age 65 is considered the "norm" and early-retiring employees are given the "actuarial equivalent" of normal retirement, based on sex-segregated mortality tables. For example, if an identically-situated male and female were to retire at age 65 with a yearly retirement benefit of $5,000, the respective present actuarial values of their benefits, based on sex-segregated mortality tables predicting 18 more years of life for the average man, and 22 for the average woman, would be $90,000 for the man ($5,000 × 18 = $90,000), and $110,000 for the woman ($5,000 × 22 = $110,000). The actuarial equivalent for early retirement for each at age 62, still based on sex-segregated mortality tables, would then be $4,285 for the man ($90,000 ÷ 21 [18 + 3] = $4,285), and $4,400 for the woman ($110,000 ÷ 25 [22 + 3] = $4,400).

If a merged mortality table were used for both sexes, as is currently done for such groups as blacks and whites, or smokers and nonsmokers, the present actuarial value of the man's and woman's retirement at age 65 would be equal (*i.e.*, $5,000 × 20 years = $100,000), and similarly, the actuarial equivalent for early retirement at age 62 would yield equal payments ($100,000 ÷ 23 = $4,348). (The above description is for demonstration purposes only and omits the role of interest in calculating present value.)

Many pension plans in current use in fact do not use sex-segregated mortality tables to establish sex-differentiated benefit levels. *See* Brief for the Society of Actuaries at 12-13, 15-16.

F.2d 1040 (4th Cir. 1976); *Rosen* v. *Public Service Electric & Gas Co.*, 477 F.2d 90 (3d Cir. 1973); *Fitzpatrick* v. *Bitzer*, 390 F. Supp. 278 (D. Conn. 1974), *appealed on other grounds*, 427 U.S. 445 (1976). Further, programs requiring women to retire earlier than men, or blacks earlier than whites, have not survived Title VII challenge. *Peters* v. *Missouri Pacific R.R.*, 483 F.2d 490 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973) (race); *Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971) (sex); *Fillinger* v. *East Ohio Gas Co.*, 4 FEP Cases 73 (N.D. Ohio 1971) (sex); *cf. Rosen* v. *Public Service Electric & Gas Co.*, 477 F.2d 90, 93, 96 n.11 (3d Cir. 1973) (sex).[10]

The Title VII holdings in these cases are based upon the statute's unambiguous prohibitions. Title VII forbids employers

> . . . to discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* . . . sex . . . . [Emphasis added]

Section 703(a)(1), 42 U.S.C. §2000e-2(a)(1).[11] As the Ninth Circuit held in this case, 553 F.2d at 593:

> A greater amount is deducted from the wages of every woman employee than from the wages of every man

[10] *Cf. Califano* v. *Webster*, 97 S.Ct. 1192 (1977) (indicating recognition by Congress and this Court of the devastating impact on women of early retirement policies applied more frequently to females than to males).

[11] *See also* Section 703(a)(2), which further forbids an employer "to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . ." 42 U.S.C. §2000e-2(a)(2).

> employee whose rate of pay is the same. How can it possibly be said that this discrimination is not based on sex? It is based upon a presumed characteristic of women as a whole, longevity, and it disregards every other factor that is known to affect longevity. The higher contribution is required specifically and only from women as distinguished from men. To say that this difference is not based on sex is to play with words.

Similarly focusing on Title VII's anticategorical premises, the Seventh Circuit ruled:

> A plain reading of the statute indicates that retirement plans which treat men and women differently with respect to their ages of retirement are prohibited .... Moreover, the classification of employees on the basis of sex is, of itself, contrary to the intent of Title VII.

Bartmess, supra, 444 F.2d at 1189. *See also Fillinger, supra,* 4 FEP Cases at 74.

Finally, the policy at issue here and the similar policy of paying women lower retirement benefits run counter to the remedial purposes of Title VII. As the House Committee on Education and Labor wrote in explaining the necessity for the 1972 amendments, which extended Title VII to state and local governments:

> The situation of the working woman is no less serious [than that of minorities]....
>
> Recent statistics released from the U.S. Department of Labor indicate that there exists a profound economic discrimination against women workers. Ten years ago, women made 60.8% of the average salaries made by men in the same year; in 1968, women's earnings still only represented 58.2% of the salaries made by men in that year. Similarly, in that same year, 60% of

> women, but only 20% of men earned less than $5,000. At the other end of the scale, only 3% of women, but 28% of men had earnings of $10,000 or more.

H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 4-5 (1971). *See also* S. Rep. No. 92-415, 92d Cong., 1st Sess. 7-8 (1971)[12] Retired women are similarly disadvantaged compared to retired men, in large part because of prior wage and job discrimination.[13] Indeed, the status of being an elderly woman correlates strongly with poverty. Women and Poverty (Staff Report, United States Commission on Civil Rights, June 1964) at 9. As the Civil Rights Commission explained:

> "Older" women (age 65 and over) receive the lowest median annual income of any age or sex group; this income of $1,899 is approximately half the amount received by men in the same age group ($3,476).[14]

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[12] The gap between the median incomes of full-time, year round men and women workers had further widened by 1973, when women's income fell to 57% of men's income. U.S. Dep't of Labor, 1975 Handbook on Women Workers 129-30.

[13] One governmental study, Women and Poverty (Staff Report, United States Commission on Civil Rights, June 1974) cited statistics showing a median benefit under private pension plans of $970 per year for women, compared to $2,080 per year for men. *Id.* at 43, citing R. Nader and K. Blackwell, You and Your Pension 14 (1973). Similarly, evidence in the *Peters* case, note 8 *supra*, indicates that men on the average receive far higher TIAA-CREF retirement benefits than women on the average. For example, in 1976, men and women received the following respective average yearly payments from TIAA: 1) $1,553 and $1,044, for the single life option; 2) $2,731 and $876, for the 2/3 benefit to survivor option, with second annuitant living; 3) $1,852 and $845, for the full benefit to survivor option, with second annuitant living; and 4) $2,619 and $1,318, for the 1/2 benefit to second annuitant option, with second annuitant living. TIAA-CREF's Supplemental Answers to Plaintiffs' Interrogatories 5-7.

[14] For the plight of older women, *see generally* Hearings on Pension Problems of Older Women, Before the Subcomm. on Retirement Income and Employment of the House Select Comm. on Aging, 94th Cong., 1st Sess. (1975).

To allow an additional, explicitly sex-based, lowering of either women's take-home wages or retirement benefits would heap on a further disadvantage, in conflict with the plain meaning of Section 703(a) and the grand design of Title VII. As the House Committee said:

> In recent years, the courts have done much to create a body of law clearly disapproving of sex discrimination in employment. Despite the efforts of the courts and the Commission, discrimination against women continues to be widespread, *and is regarded by many as either morally or physiologically justifiable.*
>
> This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination. [Emphasis added]

H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 4-5 (1971). Clearly, the Water Department and the insurance industry do think lower take-home wages and retirement benefits for women workers are "morally [and] physiologically justifiable."[15] But Congress has decreed that such practices must cease.

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[15] A similar belief was once in vogue with respect to race. *See* M. James, The Metropolitan Life: A Study in Business Growth 338-39 (1947) (higher life insurance rates for blacks are "dictated entirely by actuarial findings" and are therefore not race discrimination). As to "psychological justification," recent commentary (Note, 91 Harv. L. Rev. 241, 249 n.43 (1977)) observes:

> Title VII was intended to end employment discrimination and counteract social forces that shaped the divergent life patterns of protected and nonprotected classes. It is conceivable that the statistical experience on which gender-specific life expectancy tables are based was shaped by the work patterns of a society in which women had relatively little access to key jobs. The viability of the prediction that women will live longer than men in a world without employment discrimination could itself be open to question. *See* Lewis & Lewis, The Potential Impact of Sexual Equality on Health, 297 New England J. Med. 863 (1977).

Compare the grudging acknowledgement of this point in Brief for the Society of Actuaries at B-4.

In sum, the Water Department's policy of paying women, the vast majority of whom are identically-situated to their male co-workers, less in take-home wages, is unavoidably an explicit sex-based classification in *prima facie* violation of Section 703(a). Once plaintiffs have established a *prima facie* case, the burden shifts to the employer to rebut that case. We therefore turn to the question whether the Water Department has established a defense to its *prima facie* violation of the statute.

B. *The Traditional Insurance Custom of Computing Mortality Rates on a Sex-Segregated Basis Does Not Constitute a Defense to an Employer Policy of Overtly Discriminating Against Female Employees by According Them Either Lower Take-Home Pay or Lower Retirement Benefits Than Identically-Situated Male Employees.*

Both the Water Department and its supporting amici defend the discriminatory employment practice at issue not on the basis of the *employer's* business requirements, but on the basis of long-standing practice in the insurance industry—measuring mortality on a sex-segregated (though not on a race-segregated)[16] basis.[17] This insurance custom

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[16] *But see* M. James, The Metropolitan Life: A Study in Business Growth 338 (1947) (higher life insurance rates for blacks, once the custom, were justified as "dictated entirely by actuarial findings").

[17] The Department itself does not purchase its retirement program through an outside insurance company, but has instead set

creates neither a business necessity nor a BFOQ defense for an employer.[18]

The BFOQ defense specified in Section 703(e), 42 U.S.C. §2000e-2(e), by its very terms is not available as justification for a discriminatory compensation practice. Section 703(e) provides a narrow exception to Title VII liability for certain discriminatory hiring and employing practices. *See Dothard* v. *Rawlinson, supra.* It does not reach the range of other practices encompassed by Section 703(a)—sex-based discharge, compensation differentials, and distinctions in terms, conditions or privileges of employment.[19]

The business necessity defense, while generally available in cases challenging a neutral policy with a discriminatory impact, was not developed as a justification for explicit race or gender lines. *See* this Court's discussions of "business necessity" as a defense to the neutral height and weight rule, and BFOQ as a defense to the facial bar to women's employment in *Dothard* v. *Rawlinson, supra,* 97 S. Ct. at 2728 n.14, 2729. Although these defenses are different, a common thread unites them. To prevail once a *prima facie*

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up its own pension plan, operated by a Board of Administration, pursuant to the City Charter's mandate. Charter of the City of Los Angeles §220.1. The Department nevertheless bases its arguments upon the insurance industry's traditional use of sex-segregated mortality tables.

[18] The Department does not formally assert either a business necessity or a Section 703(e) BFOQ defense, but since the concerns of petitioners and their supporting amici should be tested by the developed law on these defenses, we address both issues here.

[19] Section 703(a) also prohibits any limitation, segregation, or classification which deprives any individual of employment opportunities or adversely affects his or her status as an employee because of such individual's sex.

violation of Title VII has been shown, the employer must establish that the challenged policy is job-related and essential to the safe and efficient operation of the employer's business. As this Court reiterated in *Dothard, supra,* 97 S. Ct. at 2728 n. 14:

> [F]or both private and public employers, "The touchstone is business necessity," Griggs, 401 U.S. at 431; a discriminatory practice must be shown to be *necessary to safe and efficient job performance* to survive a Title VII challenge. [Emphasis added]

The *Dothard* opinion quoted approvingly from a Fifth Circuit BFOQ formulation:

> [D]iscrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively. [Emphasis in original]

Diaz v. *Pan American World Airways,* 442 F.2d 385, 388 (5th Cir.), *cert. denied,* 404 U.S. 950 (1971). The Fourth Circuit further elaborated as to the business necessity test:

> [T]he business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with lesser differential racial impact.

Robinson v. *Lorillard Corp.,* 444 F.2d 791, 798 (4th Cir.), *cert. dismissed,* 404 U.S. 1006 (1971).

The justifications for the gender line at issue advanced by the Water Department and supporting amici fail completely to meet these standards. Reluctant to alter accustomed ways, amici press an insidious argument. "Actuarial equality," [20] they urge, is all that Title VII requires when the relevant characteristic (here, longevity) is impossible to determine on an individual basis. If this is a "neutral" argument, *i.e.*, not reserved for sex classifications, then of course it would apply as well to a plan providing minority group members "with less daily sick pay because of a statistically higher rate of illness among members of that minority." Note, 91 Harv. L. Rev. 241, 250 (1977). But at this point, amici actuaries retreat. "[C]ertain classifications," they assert, although

> perfectly feasible from an actuarial standpoint may be barred for other reasons of social policy. For example, black persons exhibits shorter longevity than white persons, but they are not charged a lower amount when they purchase annuities or a higher amount when they purchase life insurance.

Brief for the Society of Actuaries at 11.[21] In short, the purportedly neutral principle is pressed solely for gender

[20] The concept "actuarial equality" begs the question. Whether or not two unequal pensions are considered actuarially equal (or two equal pensions are considered actuarially unequal, *see* Petitioners' Brief at 5), depends on whether or not sex-segregated (or race-segregated, or smoker-segregated) mortality tables are used. If segregated tables are used, unequal periodic benefits will be actuarially equal; if merged tables are used (as for blacks and whites, or smokers and nonsmokers), unequal periodic benefits will be actuarially unequal. *See* note 9 *supra.*

[21] A Report by a Task Force on Risk Classification of the American Academy of Actuaries states: "Race is not now determined as a composition factor of the group because of its social unacceptability . . . ." Report on Academy Task Force on Risk Classification 15 (August, 1977).

lines.[22] But the "social policy" in point, embodied in Title VII, requires that "analogous risks be spread among the entire work force," without regard to the race, national origin or sex of employees. Note, *supra,* 91 Harv. L. Rev. at 248-50 (pointing out that *Gilbert* provides no shield for the sex segregation petitioners and amici champion).

The employer and insurance industry pleas to substitute "actuarial equality" for Title VII's anticategorical premises fall into four general categories: cost; insurers' reliance on group-based experience; equity and risk classification; and adverse selection.

1. The Employer Defense: Cost.

Petitioners and amici assert employer costs will rise if women are accorded both equal take-home pay and equal retirement benefits. Compliance with Title VII, however, was not intended to be cost-free.

Notably, the Water Department has been providing equal take-home pay since January 1, 1975, pursuant to a new state law. Cal. Gov. Code §7500 (West, 1977). The Department does not argue that the small additional cost compliance with the law entails affects its ability to provide water and power, safely and efficiently, to the City of Los Angeles. Current experience thus demonstrates that the Department's policy of lower take-home pay for women was in no way "necessary to safe and efficient" operations. *Dothard,*

[22] Nor is this the only point on which the actuaries' "neutrality" is open to question. While their brief (at 30) counsels against disturbing long-standing custom, it is clear even from their slanted presentation that retirement plans giving equal benefits to men and women are widely used, evidently without untoward effect. *See* Brief for the Society of Actuaries at 12-13, 15-16.

supra. Nor did that policy touch the "essence of the [Department's] business." *Diaz, supra*.

It is true, of course, that effective implementation of equal employment guarantees will frequently result in added costs to the employer. *See, e.g., Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974) (requiring employer to raise day shift women's wages to the level paid to men hired to work the night shift); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975) (requiring full back pay to achieve "the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination"); *Robinson* v. *Lorillard Corp., supra*, 444 F.2d at 799 n.8, 800 (holding "dollar cost alone," or "avoidance of the expense of changing employment practices is not a business purpose that will validate . . . an otherwise unlawful employment practice").

The Department's current provision of equal take-home pay to women effectively answers the insurance industry amici prophecies of unbearable expense unless the Court sanctions a departure from Title VII's central command. The asserted billions (Brief of American Council of Life Insurance at 3, 43, 47) are not based on evidence in any case. Significantly, no insurance industry brief points to a prohibitive cost for the Water Department itself. Moreover, the evidence in another pension-plan case currently on trial, *Peters* v. *Wayne State University and TIAA-CREF*, Civ. Act. No. 6-70165 (E.D. Mich.),[33] indicates that the actual costs of dropping the gender line are minus-

[33] The District Court denied defendants TIAA-CREF's motion for summary judgment on September 21, 1977. *See* note 8 *supra*.

cule for a particular employer—less than ⅓ of 1% of the employer's gross payroll budget."

Finally, it is the purpose of Title VII to raise the economic status of women and minorities by eliminating pervasive employment discrimination in both jobs and compensation. In light of this purpose, it would be perverse to justify continued lower wages or retirement benefits for women on the ground that it costs more to pay them equally with men. Thus, the sole business purpose advanced on behalf of employers—avoidance of added costs—surely does not establish a business necessity defense in this case.

2. Insurance Industry Objections.

The remaining arguments advanced—insurers' reliance on group-based experience, equity and risk classification, and adverse selection—are not employer business purposes. Rather, they concern the operations of insurers with whom employers contract to provide fringe benefits to their employees. Cost apart,[35] they do not impact on the

[34] In discovery, defendants TIAA-CREF stated:

> The University was advised on September 10, 1975 that it would cost an estimated $188,000 additionally per year in order to pay women the same monthly benefits as now received by the men based upon the contributions by and on behalf of the women in the retirement program at Wayne State for the year 1974-75.

TIAA-CREF's Answer to Plaintiffs' Interrogatory 33. Defendant Wayne State University stated that its gross payroll budget for 1974-1975 was $84,306,283.08. Wayne State University's Answer to Plaintiffs' Interrogatory 2. $84,306,000 ÷ 188,000 = .0022, or .2%.

[35] Added cost to the employer is only short-term—the cost required to raise benefits of women to the level of *vested* benefits men employees will be entitled to receive. In the long run, compliance with Title VII will be achieved by pooling the mortality

employer's business. Therefore they do not qualify as *employer* defenses. In addition, there is no record in this case, which was decided by summary judgment, as to whether any of the insurance industry concerns are even factually based. Nevertheless, since they play such a prominent role in the insurance industry briefs, they will be addressed here.

a. *Insurers' Reliance on Group-Based Experience*

The insurance industry's prime argument is that insurers must use groups, and in particular, sex-based groups. The central purpose of Title VII, all concede, is equal treatment for individuals. But amici stress that longevity is impossible to determine by individual testing and that insurers must use the statistical experience of large groups to determine rates and benefit structures. This is true, but irrelevant to the issue before the Court.

Respondents, of course, do not seek individual predictions of longevity. Rather, they claim that individual men and women working the same job, for the same number of years, and retiring at the same date, are entitled to receive equal take-home wages and pension benefits. Respondents contend that insurers can accommodate by pooling the mortality experience of men and women, *just as mortality experience is pooled for all other groups with different average longevity rates.* Such groups include, for example,

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experience of men and women just as the mortality experience of blacks and whites, smokers and nonsmokers, those with high blood pressure and those with normal pressure, obese and thin, are currently pooled. This pooling would raise the benefit level for women and lower it somewhat for men, as is currently the case for all other groups with different mortality rates.

black[34] and whites, smokers and nonsmokers,[35] persons with high blood pressure and those with normal blood pressure, the obese and the thin, persons with a family history of short longevity and those with long-lived families. Pooling would enable insurance companies to charge the same premiums and pay the same benefits to men and women, just as they do now for blacks and whites, or smokers and nonsmokers.

Significantly, such accommodation is not new to the industry. Insurers have discontinued reliance on grouping by race, once considered "dictated entirely by actuarial findings." M. James, The Metropolitan Life: A Study in

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[34] In 1973, whites in the United States had an estimated average length of life of 72.2 years, non-whites, 65.9 years. U.S. Dep't of Health, Education, and Welfare, Vital Statistics of the United States, 1973, Volume II-Section 5, Life Tables, Table 5-5.

[35] A recent study, conducted at the University of California at Berkeley, of the reasons for the gap between the average mortality experience of men and women found that men's higher smoking rate accounted for about half the gap. Rethorford, The Changing Sex Differential in Mortality 104 (1975):

> A detailed analysis of the impact of tobacco smoking trends on the SMD [sex mortality differential] is possible only for the United States based on American Cancer Society data specific for sex, age, smoking status, and ICD [International Classification of Diseases] cause of death. Analysis shows that smoking accounted for 47 percent of the female-male difference in $_{50}e_{37}$ (life expectancy between 37 and 87, the age range of the ACS data) in 1962, and about 75 percent of the increase in the female-male difference in $_{50}e_{37}$ between 1910 and 1962.

Another recent study of the effect of cigarette smoking on longevity concluded that not only do nonsmokers generally live longer than smokers (by a difference of more than ten years), but that women who smoke cigarettes on the average live six years less than men who smoke cigarettes. Northeastern Pennsylvania Study on Smoking and Health, Journal of Breathing (Illinois Lung Association), June 1975.

Business Growth 338-39 (1947).[28] In time, the same acknowledgement may be expected with respect to sex classification.

Plainly, the insurance industry's insistence on the need to segregate by sex[29] fails the *Robinson* test, quoted *supra* at p. 27. There is an available "acceptable alternative policy . . . which would accomplish [the business purpose advanced] equally well with a lesser differential . . . impact

[28] Inexplicably, amici TIAA-CREF appear to claim they are "not aware" of this history. Brief at 6.

[29] Discovery and evidence in *Peters* v. *Wayne State University and TIAA-CREF*, Civ. Act. No. 6-70165, now on trial in the Eastern District of Michigan, suggest that pooling of men's and women's experience to set rates and benefits is far easier than is suggested by the insurance industry amici briefs. For example, plaintiffs in *Peters* presented evidence showing that Wayne State's group life insurance plan, procured through Massachusetts Mutual Life Insurance Company, charged Wayne State a flat rate of 61 cents per thousand dollars of coverage per month per employee, and paid benefits without distinction based on sex. Trial Transcript at 683-84 (Oct. 7, 1977). This flat rate covered both the basic $5,000 of coverage given all employees on a noncontributory basis, and the supplemental insurance of one or two times an employee's annual salary, provided on a contributory basis. The employees' contribution for the supplemental insurance varied depending on age, but not on sex. *Id.* at 678-682. Thus, in life insurance, women and the employer are charged equal rates and women receive equal benefits; of course, in this instance, pooling works in men's favor, since life insurance rates would be lower for women, or benefits would be higher, if sex-segregated mortality tables were used.

In addition, TIAA-CREF acknowledged that it is technically possible to establish a retirement program which does not differentiate in either contributions or periodic benefits on the basis of sex. TIAA-CREF Answer to Plaintiffs' Interrogatory 48. Finally, Mr. Arthur Anderson, an actuarial witness called by plaintiffs, testified that it would be possible for TIAA-CREF to continue to provide a defined contribution plan without differentiating in benefits on the basis of sex, and that doing so would not affect their solvency; ". . . it would mean they'd have to set different premium rates, but they could be uniform for both sexes." Trial Transcript at 70 (Sept. 28, 1977).

[on women]." *Robinson, supra,* 444 F.2d at 798. That policy: pooling the experience of men and women, as is done for other groups with different average longevity. Nor is the alternative untried. Many plans now in existence provide contribution rates and benefits based on such pooling. *See, e.g.*, the sex-neutral rate and benefit schedule of the Metropolitan Mutual Life Insurance Company discussed in note 29 *supra*, and the actuaries' acknowledgement that options under defined-benefit plans which are commonly sex-differentiated can be and have been made sex-neutral. Actuaries Brief at 15-16. Under these plans, the same contribution is made for a man and a woman, and sex does not determine the benefits due an employee.[30] Moreover, it should be stressed that respondents do not in fact challenge the insurance industry's need to use groups, but seek rather to *extend* group concepts. Abandoning the particular classification at issue does not require switching to "individualized" predictions of longevity; it simply expands the group insurers use.

In sum, the insurance industry cannot maintain persuasively that sound pension plans depend on sex classification, any more than they depend on race classification or classification based on a host of health and environmental factors insurers choose not to use in group insurance contexts.

[30] "Unisex," far from offending any constitutional principle as amici TIAA-CREF would have it (Brief at 24-25), is precisely what the judgments in *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), and *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), yielded. Monthly benefits to widower Leon Goldfarb were not a penny larger than those a widow received. In fact, what *Wiesenfeld* and *Goldfarb* prohibited, amici urge here: use of gender as a proxy for another trait or characteristic.

b. *Equity and Risk Classification*

Equity is a central insurance concept, and sex classification is necessary to achieve it, insurers assert. Equity is defined as determining the proper risk classification for persons, and either charging them premiums or paying them benefits on the basis of their classification. Further, petitioners and supporting amici claim it would be inequitable specifically to men to pay women equal take-home pay and equal retirement benefits. Since "women outlive men," petitioners and their amici maintain equality would in fact result in men subsidizing women's benefits. The flaw in this argument is apparent: group insurance would be impossible unless one class subsidized another.

In contrast to individual insurance, where equity considerations are of prime importance, *group* insurance plans do not essay particularized risk classification for participants. Rather, they pool risks broadly. With respect to individual policies, insurers must assess closely a policy applicant's chance of living or dying in order to avoid individuals self-selecting a particular product with adverse consequences to the insurer. For example, if persons with extremely good health (long-lived persons, on the average) were the only ones to buy individual annuities with premiums and benefits based on average health characteristics of the population as a whole (average-lived persons), the insurer would suffer loss in the long term. To protect against this eventuality, the insurer carefully evaluates each individual's health and occupation, taking into account a large number of risk-indicating factors, so as to make as accurate a risk classification as is feasible.

But in group plans, such individualized treatment is neither necessary nor appropriate. Participants do not have the right to select the product. Therefore, a range of risks is guaranteed to the insurer. As actuary Arthur Anderson testified in the *Peters* case, note 8 *supra*:

> In a group situation . . . you look at the group as a whole and the product is characterized by the fact that you get to cover all of the group. You do not have the right of refusing anyone of the group, typically, and you generally get them all so that they can't pick and choose you and the risks can't select you and the product is uniform and generally has a standard premium rate of some sort. And the idea of doing that is that you avoid the expense of individually examining each person to determine his own prospects for life or death in return for getting a decent cross-section of everyone, and in that cross-section, if you can make sure you get them all, you can be sure of getting some good risks and some bad risks and some so-so risks all together and getting a nice distribution and avoid any selection by people who are buying the insurance.
>
> The idea, if I may go further, the idea, too, in a group insurance is for all these people in the group, within the group to pool the risk as a group, whereas in individual insurance . . . the idea is to pool the risk within your own little class.

Trial Transcript at 58-59 (Sept. 28, 1977). Thus, most *group* plans do not use a range of classifying factors—such as smoking versus nonsmoking, fat versus thin, high blood pressure versus normal blood pressure—to place each person in his or her "own little class." Instead, group plans routinely use only age,[31] and, less pervasively, sex.[32]

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[31] Age as a classification, of course, is not under attack in this lawsuit, although the amici briefs supporting petitioners sometimes treat age and sex classifications as though they were inex-

Thus, the importance of equity in the group plan context has been exaggerated by amici supporting petitioners. Employees generally have the right to join only the particular plan the employer offers, and frequently are required to join the plan as a condition of employment. Even where participation is theoretically voluntary, forgoing participation normally means forfeiting a very substantial employer contribution, contrary to the employee's economic self-interest.[33] In short, the business purpose advanced here by the insurance industry—equity—is unconvincing as an excuse for sex classification in a *group* plan that uses no other classification apart from age.

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tricably linked. By contrast, Congress specifically treated the two classifications differently: Congress expressly exempted retirement plans from the reach of the Age Discrimination Act (29 U.S.C. §623(f)(2)); it adopted no such exemption to Title VII.

Moreover, there is a critical difference between age and sex as a basis for classification. One's age inevitably changes; one's sex, like one's race, does not. This points up a fatal flaw in the age overlap theory TIAA-CREF submit to rebut the sex overlap of 84%. If a woman aged 60 is identically situated (*i.e.*, same job, salary, number of years worked, and amount in her retirement account) to a woman aged 65, except for her age, she merely need wait until 65 to retire in order to get the same benefit as the currently 65 year old woman. (If, on the other hand, she is not identically situated with the 65 year old (*i.e.*, she has worked 5 fewer years and has 5 fewer years of employer contributions in her retirement account), it is not discrimination to pay her lower benefits upon retirement at age 60 than to the woman retiring at age 65.)

In contrast, a woman who is identically situated to a man can never become a man and collect the same take-home wages or benefits that he receives.

[32] Many do not use sex. *See* text at note 30 *supra*.

[33] In Wayne State's TIAA-CREF pension plan, for example, the University contributes 10% of the employee's salary, but the employee has no right to that 10% of salary if he or she waives participation.

The related argument that equal take-home pay and equal benefits would unfairly penalize men by forcing them to subsidize women is similarly inapposite. For the contention that elimination of sex segregation requires males to subsidize females is no more accurate than a charge that failure to segregate by race means blacks subsidize whites. In fact, the short-lived (a class which includes many women) subsidize the long-lived (a class which includes many men). Subsidizing of that kind is the key feature of group insurance. Moreover, as demonstrated in I. A. *supra*, the correlation between sex and length of life is, at best, highly imprecise.

Ironically, if the "equity" argument prevailed, it would follow logically that blacks—with their shorter average longevity—would have a Title VII claim against any employer giving them equal retirement benefits, a claim grounded on the theory that they are subsidizing whites.[34] The relief sought would be to award blacks higher retirement benefits than whites. Whites would have a claim where life insurance benefits are no higher for them than for blacks, women, a similar claim when life insurance proceeds are the same for males and females. Surely claims so founded would stand on its head Title VII's anti-categorical approach.

c. *Adverse Selection*

Spinning out the group-based experience and equity objections, TIAA-CREF suggest that if individuals (pre-

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[34] Any ethnic group that could establish a shorter average longevity experience than other ethnic groups would have a similar claim. *Cf. Craig* v. *Boren*, 429 U.S. 190, 208 n. 22 (1976) (citing statistics on different drinking rates for different ethnic groups).

sumably, men) are forced to subsidize other individuals' risks (presumably, women's) the "subsidizers" will leave the pool, thus occasioning the eventual collapse of insurance schemes. TIAA-CREF Brief at 6 and 26-27. The American Council of Life Insurance predicts unstable rates and a reduction in insurance coverage for all employees, Brief at 3-4, 46-47, as well as the demise of insurance associations, Brief at 46 n. 101, if men leave the insurance pool. *See also* Brief for the Society of Actuaries at 10 n. 6. The adverse selection argument suffers from the same defect as the equity claims. It assumes a condition that in fact does not exist. The practical reality is that individuals, whether employed by the Water Department or by a college or university, do not have the right to select their group. Moreover, refusal to join the group covered by the employer's plan is not in the employee's economic self-interest. *See* note 33 *supra*. There is thus no genuine risk that men will walk out, en masse, of group retirement plans that offer equal take-home pay and retirement benefits to women employees. Just as blacks, smokers, and the obese have not walked away from group plans providing equal benefits for whites, nonsmokers, and the thin, it is fanciful to suppose men will desert plans according equal benefits for women.

In contrast to insurance industry amici's forecasts of massive resistance by male employees, the position of the American Association of University Professors (AAUP), amicus on this brief, is particularly enlightening. AAUP represents many of the university professors who are a major consumer group for the TIAA-CREF plan. AAUP, with its majority male membership, has specifically endorsed equal benefits for men and women under that plan,

and has forecfully urged this position in several elaborative statements. *See, e.g.*, On Equal Monthly Retirement Benefits for Men and Women Faculty, AAUP Bulletin 316 (Winter 1975); Interim Report on Equal Periodic Pension Benefits for Men and Women, AAUP Bulletin 339 (Autumn 1976); D. Halperin, Should Pension Benefits Depend Upon the Sex of the Recipent?, AAUP Bulletin 43 (Spring 1976).

Finally, predictions that employers with largely male work forces will leave insurance plans to become self-insurers, thus occasioning unstable rates, rest on apparent assumptions that employers will violate Title VII by hiring only or mostly men,[35] and on remote and impure speculation. Employers select insurers for a variety of reasons other than pricing factors attributable solely to the sex composition of the covered group. They are interested in, *inter alia*, the soundness of the insurer's financial investments, the funding required of the employer, and any particularly desirable feature for the employer's industry (*e.g.*, the portability of the TIAA-CREF plan, from one university to another, which facilitates mobility among faculty members). In sum, the specter of disaster—the prophecy of rampant adverse selection if women are not paid lower take-home wages or retirement benefits than identically-situated men—has scant basis in fact. Rather, the adverse selection argument layers distortion and speculation.

A further point should be made as to the character of insurers' and employers' reliance on the fact of greater average female longevity. That reliance is indeed a some-

[35] Of course, even employers of all-male work forces must pay for the longevity of those men's spouses, if they offer joint-life options. *See* note 38 *infra*.

times thing. Employers, including the Water Department,[36] have sometimes forced women to retire earlier than men. But if "women live longer than men" is the guiding light, then of course men, not women, should have been singled out for forced early retirement. Under joint-life benefit options, female spouses of male employees sometimes receive *higher* benefits than identically-situated male spouses of female employees.[37] If employers, as the Water Department here,[38] pay the entire cost of the retirement benefit

[36] Affidavit of Alice Muller in Support of Plaintiffs' Motion for Preliminary Injunction (filed Sept. 6, 1974). *See also Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971); *Califano* v. *Webster*, 97 S.Ct. 1192 (1977).

[37] Plaintiffs posed interrogatories to TIAA-CREF in the *Peters* case, note 8 *supra*, on three hypothetical sets of identical but opposite-sex couples: 1) one where the employee was 65 and the spouse 62; 2) one where the employee was 65 and the spouse 65; and 3) one where the employee was 65 and the spouse 67. Plaintiffs asked, as to each set of couples, whether there would be any sex-based differential, under any of TIAA-CREF's joint options, in the amount received by either the employee, or the employee's spouse (after the death of the employee). The reply was yes in almost all instances. Under an option giving a half-benefit to the second annuitant, the male employee received more than the female employee in all three sets of compared couples; similarly, the male employee's *spouse* received more than the female employee's *spouse* in all three sets of compared couples. Under the two-thirds and full benefit to survivor options, the male employee and his spouse each received: 1) less than his/her counterpart in the opposite-sex couple, where the spouse was 62; 2) the same as the counterpart, where the spouse was 65; and 3) more than the counterpart, where the spouse was 67. TIAA-CREF's Answers to Plaintiffs' Interrogatory 3.

[38] The Department stated that there were 727 female *spouses* receiving benefits, as of August 15, 1974, as survivors of male employees who died after retiring from the Department; in contrast, only 13 male spouses were receiving such benefits on the same date. Department's Answers to Plaintiffs' Interrogatories 9a and 11a.

for *spouses*, they pay more for female dependents of men than for male dependents of women, based on the same fact of greater average female longevity. And finally, when employers pay men less for early retirement than identically-situated female employees, and derive support for that practice from the insurance industry's sex-segregated mortality tables, *see* note 9 *supra*, the picture becomes all the more curious.

In conclusion, none of the business purposes advanced in this case qualify as defenses under established Title VII law. The Water Department's own current provision of equal take-home pay and equal retirement benefits indicates the speciousness of the alleged "cost" defense—the only defense relating to the *employer's* business. The remaining insurance concerns—grouping, equity, and adverse selection—on inspection, are revealed as either not under attack, not relevant to group insurance plans, or not based on fact. They should be decisively rejected for what they are: attempts to justify explicit sex discrimination by resort to custom—the long-standing tradition of sex-segregated mortality tables in the insurance industry. It may well be that "habit, rather than analysis," makes the sex line seem "acceptable and natural," where a line based on race, religion or national origin would be recognized as offensive and intolerable. *See Mathews* v. *Lucas*, 427 U.S. 495, 520-21 (1976) (Stevens, J. dissenting) ("Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female . . .; for too much of our history there was the same inertia in distinguishing between black and white."); *Califano* v. *Goldfarb*, 430 U.S. 199, 224 (1977) (Stevens, J. concurring).

C. *The Bennett Amendment Provides No Defense to an Employer Policy of Paying Women Lower Take-Home Wages or Retirement Benefits Than Men.*

Petitioners and supporting amici argue that the part of Section 703(h) of Title VII known as "the Bennett Amendment" provides a defense to the Water Department's violation of Section 703(a). Their argument is threefold. First, they assert that the Bennett Amendment allows use of non-sex-based factors in setting compensation differentials, and that the Water Department's policy of paying women less take-home pay than men is not based on sex, but on longevity. Second, they argue that a Humphrey-Randolph colloquy indicates a Congressional intent to allow discriminatory sex-based classifications in retirement plans. Third, they argue that the Bennett Amendment makes an Equal Pay Act interpretive regulation cited in *Gilbert*, 29 C.F.R. §800.116(d), controlling in Title VII discrimination cases.

All three arguments lack merit. The employer policy here is not based on a "factor other than sex"; it is based explicitly and solely on sex. The Humphrey-Randolph colloquy does not indicate a Congressional intent to allow gender lines which operate to the detriment of women workers. The interpretive regulation, by allowing sex-based differentials in wages, is contrary to the text of the Equal Pay Act and inconsistent with another Equal Pay Act regulation; indeed, the Labor Department itself retreated from the regulation by filing a brief in the Ninth Circuit urging that women were entitled, under the Equal Pay Act, to take-home pay equal to men's. Finally, the relevant EEOC regulations clearly prohibiting the employer practice at issue are entitled to deference under the Court's *Gilbert* standard.

1. Section 703(h) Does Not Provide an Exemption for the Overtly Sex-Based Wage Policy at Issue.

By its express terms and plain meaning, the Bennett Amendment merely incorporates into Title VII the exceptions stated in the Equal Pay Act. The relevant provision of Section 703(h) reads:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer *if such differentiation is authorized by the provisions of Section 206(d) of Title 29* [the Equal Pay Act]. [Emphasis added]

The controlling question, therefore, is what wage differentiation is authorized by the Equal Pay Act. That Act provides:

> *No employer* having employees subject to any provisions of this section *shall discriminate*, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, *except where* such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . . [Emphasis added]

29 U.S.C. §206(d)(1).

This language *prohibits* wage discrimination for equal work up to the point where the "except" clause begins.

The wording following the "except" clause, on the other hand, expressly *authorizes* unequal pay for equal work, to the extent that the differential payment is made pursuant to the enumerated systems or factors. Thus, the Bennett Amendment incorporates into Title VII the explicit Equal Pay Act exceptions, *i.e.*, pay differentials based on seniority, merit, piecework systems, and other non-sex-related factors.[39] An employer policy explicitly based on sex, by definition, cannot be one based on a "factor other than sex."[40]

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[39] The meager legislative history is in accord. Senator Dirksen explained:

> We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.
>
> *All that the pending amendment does is recognize those exceptions,* that are carried in the basic act. [Emphasis added]

110 Cong. Rec. 13647 (1964). *See Laffey* v. *Northwest Airlines*, —— F.2d ——, 13 FEP Cases 1068, 1078 and n. 104 (D.C. Cir. 1976); *Manhart, supra*, 553 F.2d at 587-588, 590. Senator Bennett, the only other Senator to offer an explanation of the Amendment's meaning prior to its adoption, characterized it as a "proper technical correction of the bill," 110 Cong. Rec. 13647, designed "to provide that in the event of conflict, the provisions of the Equal Pay Act shall not be nullified." *Id.* Senator Humphrey also spoke, saying nothing about what the Amendment meant, but remarking that it was "helpful" and "needed." *Id.* After adoption of the Amendment, he made further remarks, fairly described as confusing. 110 Cong. Rec. 13663-64. See text at pp. 48-51 *infra*.

Senator Bennett's remarks one year later, 111 Cong. Rec. 13359 (July 11, 1965), are not, of course, legislative history. *See* remarks of Senator Clark, one of the floor managers of Title VII, 111 Cong. Rec. 18261-63 (July 26, 1965).

[40] This fourth Equal Pay Act exception was evidently designed to deal with neutral policies which might have a differential impact on women workers, such as a shift differential or a training program under which, in practice, men receive higher wages than women. *See Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974); *Hodgson* v. *Behrens Drug Co.*, 475 F.2d 1041 (5th Cir.), *cert. denied*, 414 U.S. 822 (1973).

The Water Department attempts circumvention by arguing that an explicit policy of paying all women less than all men is simply not based on sex, it is based on longevity.[41] However, it is impossible to hide or disguise the reality that the sole criterion involved is gender *per se*. And, as discussed in I.A. *supra*, sex is a highly imprecise proxy for length of life: the vast majority of men and women can be matched in death ages. Unavoidably, the Department's wage policy is based explicitly and exclusively on sex.

Since Section 703(h) by definition does not authorize explicitly sex-based wage policies, statutory analysis would ordinarily end the inquiry here. However, the Water Department and insurance amici contend that a colloquy between Senators Humphrey and Randolph indicates a Congressional intent to exempt sex-based differentials in retirement plans from the ambit of Title VII. We turn next to that contention.

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[41] Contrast with Petitioners' Brief at 11-16 the Court's clear understanding in *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974), that the words "any other factor other than sex" mean a factor apart from sex, and surely not a factor explicitly identified by a gender label. The Court, in *Corning*, affirmed a lower court ruling that the pay disparity "was in large part" related to sex, 474 F.2d at 233, and did not serve merely as compensation for night work. So long as the sex factor continued to infect the calculus, the employer could not successfully urge in defense that the practice fell within the exception for "a factor other than sex."

2. The Humphrey-Randolph Colloquy Does Not Indicate a Congressional Intent to Allow Gender Lines Which Operate to the Detriment of Women Workers.

After passage of the Bennett Amendment, Senators Humphrey and Randolph held the following colloquy:

> MR. RANDOLPH. Mr. President, I wish to ask of the Senator from Minnesota [Mr. Humphrey], who is the effective manager of the pending bill, a clarifying question on the provisions of Title VII.
>
> I have in mind that the *social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security receives an additional old age benefit; but the husband of such an employee does not.* These differences in treatment as I recall, are of long standing.
>
> Am I correct, I ask the Senator from Minnesota, in assuming that *similar differences* of treatment in industrial benefit plans, including *earlier retirement options for women*, may continue in operation under this bill, if it becomes law?
>
> MR. HUMPHREY. Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett Amendment; so there can be no doubt about it. [Emphasis added]

110 Cong. Rec. 13663-64 (June 12, 1964).

Senator Humphrey's remarks are best described as confusing. For example, the Senator stated, what plainly is not the law, that the Equal Pay Act allows employers to retire women earlier than men. The Equal Pay Act simply has no

application to differential retirement ages based on sex." By contrast, Title VII unquestionably does prohibit such discrimination. *Bartmess* v. *Drewrys, U.S.A., Inc.*, 444 F.2d 1186 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971). Since discussion on the floor of Congress is "generally entitled to little probative weight" in discerning legislative intent, absent clear indications that the speakers are well informed, 2A Sands, Sutherland Statutory Construction, §48.13 at 217 (4th ed. 1973), the Senator's remarks in this context" provide no guidance for the Court.

Second, the Senators seemed concerned with preserving favorable treatment for women (in particular, for women dependents who were either widows or wives of retired men). They did not focus on the question whether sex-

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" As the Ninth Circuit observed:

> . . . Senator Humphrey's remark reflects an erroneous interpretation of the Equal Pay Act. Because all that the Bennett Amendment did was to incorporate the exemptions of the Equal Pay Act into Title VII, it is questionable whether the Senator's statement, made during the debates on the incorporating statute, would be significant when it erroneously interprets the incorporated statute.

Manhart, supra, 553 F.2d at 590.

" Congress earlier (1956) displayed its awareness of the severely adverse impact on women of early retirement policies employers applied to them, but not to men. To compensate, Congress adjusted the social security benefit calculation formula to favor retired women workers. In 1972, with Title VII on the books, covering the range of private and public sector employment, and outlawing the discriminatory practices that provided the *raison d'etre* for the 1956 sex-specific classification, Congress phased out the social security differential by extending to men the more favorable calculation formerly reserved to women. *See Califano* v. *Webster*, 97 S.Ct. 1192 (1977), and references cited therein.

based lines which penalize women wage earners should be preserved."

However, this Court focused on that precise question, in a decision issued three months after *Gilbert*. In *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), the Court unequivocally rejected attempts to bolster gender lines as favorable to some women (dependent wives or widows) when those same lines in fact penalized women wage earners. Relying on carefully reasoned precedent, *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), the Court in *Goldfarb* invalidated the sex criterion in the very social security provisions cited by Senator Randolph.

If these sex-based classifications and other "similar differences" operate to deprive women wage earners of equal protection, they cannot be valid "factors other than sex" allowed by the Bennett Amendment. For as the Court further stated in *Gilbert*:

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[44] To the extent that the Senators proffered the Social Security system as a model to be followed, that system now pays equal retirement benefits to men and women; although at the time it accorded women workers a more favorable benefit calculation formula "to compensate women for past economic discrimination." *Califano* v. *Webster*, 97 S. Ct. 1192, 1195 (1977). The Court recognized the validity of that compensatory purpose, noting that even with a more favorable benefit formula, women workers, because of the depressed wages they were paid, received lower average retirement benefits than men ($179.60 per month for men versus $140.50 for women). *Webster* at n.5. The Court explained: "... we have rejected attempts to justify gender classifications as compensation for past discrimination against women when the classifications in fact penalized women wage earners, *Califano* v. *Goldfarb*, ... *Weinberger* v. *Wiesenfeld*, ... or when its legislative history revealed that the classification was not enacted as compensation for past discrimination." 97 S. Ct. at 1194. *See also Lewis* v. *Cohen*, 417 F. Supp. 1047 (E.D. Pa. 1976).

> ... court decisions construing the Equal Protection Clause of the Fourteenth Amendment ... are a useful starting point in interpreting [Title VII].

Gilbert, supra, 429 U.S. at 133. And certainly Title VII's sex discrimination prohibitions are more stringent than those afforded by the guarantee of equal protection. *Washington* v. *Davis,* 426 U.S. 229 (1976).

3. The Wage and Hour Administrator's Interpretive Regulation, 29 C.F.R. §800.116(d), Is Not Entitled to Deference.

The insurance amici's third argument relies on a Labor Department (Wage and Hour Administration) interpretive bulletin, 29 C.F.R. §800.116(d),[45] which purports to authorize sex-based differentials in either the employer contributions for retirement programs, or the employee benefits received under them.[46] That regulation provides:

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[45] The Water Department relied on this bulletin in the Ninth Circuit but has abandoned the argument before this Court, apparently because the Labor Department submitted a brief below arguing the interpretation was not applicable to this case.

Instead, petitioners argue that the Court should defer to a Labor Department interpretation when it favors defendants, but reject as "weightless" any Department interpretation that favors plaintiffs. Brief at 28-29, 35. This "heads, we win, tails, you lose" position is typical of the view petitioners take in this case.

[46] There is an initial question whether the Equal Pay Act, which is limited to a prohibition on sex-based *wage* differentials, reaches employer contributions to retirement programs or the employee's receipt of benefits under those programs. *See* the Wage and Hour interpretive bulletin, 29 C.F.R. §800.113, stating:

> Study is still being given to some categories of payments made in connection with employment subject to the Act, to determine whether and to what extent such payments are remuneration for employment that must be counted as part of wages for equal pay purposes. These categories of payments include ... *contributions irrevocably made by an*

> If employer contributions to a plan providing insurance or similar benefits to employees are equal for both men and women, no wage differential prohibited by the equal pay provisions will result from such payments, even though the benefits which accrue to the employees in question are greater for one sex than for the other. The mere fact that the employer may make unequal contributions for employees of opposite sexes in such a situation will not, however, be considered to indicate that the employer's payments are in violation of section 6(d), if the resulting benefits are equal for such employees.

29 C.F.R. §800.116(d). Because this Court relied, in part, on the above Wage and Hour Administrator's interpretation in declining to follow the EEOC's pregnancy guideline in *Gilbert,* the supporting amici skip over the plain meaning of the Bennett Amendment and jump directly to the regulation. They baldly assert that the Administrator's interpretation controls this case; they do not explain how a regula-

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> *employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement,* life, accident, or health insurance or similar *benefits for employees.* [Emphasis added]

The uncertainty this statement reflects evidently stems from the limited purview of the Fair Labor Standards Act, to which the Equal Pay Act was an amendment. *See* 29 U.S.C. §207(e), defining the "regular rate" of pay for purposes of overtime provisions of the FLSA as including:

> . . . all remuneration for employment paid to, or on behalf of, the employee, but *shall not* be deemed to *include*—
>
> . . .
>
> (4) *contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement,* life, accident, or health insurance or similar *benefits for employees.*

The Equal Pay Act does not define the terms "wages" or "wage rates," but the House Committee on Education and Labor, in its report on the bill, stated that "[t]he definitions and interpretations of the Fair Labor Standards Act apply." H.Rep. No. 309, 88th Cong. 1st Sess. (1963), 109 Cong. Rec. 9211.

tion allowing a sex-based factor as a defense squares with an Equal Pay Act exception expressly limited to factors "other than sex."

Amici misconstrue the thrust of the *Gilbert* opinion. First, the central holding of *Gilbert* was that the disability classification at issue was not sex-based at all; rather it was a *neutral* policy. *See Nashville Gas Co.* v. *Satty,* 46 U.S.L.W. 4026 (Dec. 6, 1977). Obviously, in that context, a Labor Department regulation allowing a differential would be based on a "factor other than sex," *i.e.,* pregnancy, and thus would conform to the language of the Equal Pay Act's fourth exception. Second, this Court did not hold that Wage and Hour Administration interpretations were always to be favored over EEOC regulations. It merely found that a portion of a particular EEOC regulation which suffered from a number of defects was not entitled to deference.

In *Gilbert,* the Court referred to the *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944), statement of the role of interpretive rulings:

> The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

In this case, it is the Wage and Hour interpretation which does not merit deference, and the EEOC position which does.

The most conspicuous defect of 29 C.F.R. §800.116(d) is its allowance of explicit sex-based differentials in employer

contributions for retirement plans and in retirement benefits received by employees. In stark contrast, the Equal Pay Act expressly prohibits sex-based differentials, and affords a defense only to employers who establish that a pay disparity is occasioned by a "factor other than sex," *e.g.*, a *bona fide* shift differential, *Corning Glass Co.* v. *Brennan,* 417 U.S. 188 (1974), or training program. *Hodgson* v. *Behrens Drug Co.,* 475 F.2d 1041 (5th Cir.), *cert. denied,* 414 U.S. 822 (1973).

This conflict with the Equal Pay Act is highlighted by a second Labor Department regulation, which is inconsistent with 29 C.F.R. §800.116(d). The second regulation, 29 C.F.R. §800.151, provides:

> A wage differential based on claimed differences between the average cost of employing the employer's women workers as a group and the average cost of employing the men workers as a group does not qualify as a differential based on any "factor other than sex," and would result in a violation of the equal pay provisions, if the equal pay standard otherwise applies. To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purposes of the Equal Pay Act. Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex under similar working conditions in jobs requiring equal skill, effort, and responsibility.

Both the Water Department's former policy of paying women lower take-home wages than men and the familiar analogue of paying women lower retirement benefits than men are "based on claimed differences between the average cost of employing the employer's women workers as a group and the average cost of employing the men workers as a group . . . ." 29 C.F.R. §800.151. That is, both policies rest on the proposition that the average cost of the same amount of retirement pay will be higher for women as a class than for men as a class, and that this higher cost should be reflected either on the contribution end (by requiring higher contributions from women, as here), or on the benefits end (by providing lower benefits to women). Moreover, under these two policies, "the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex . . .," thus serving "only to perpetuate and promote the very discrimination at which the Act is directed . . . ." 29 C.F.R. §800.151. As discussed in I.A. *supra,* the group cost experience is in fact assessed against the vast majority (84%) of women who will not outlive similarly-situated male co-workers.

The Labor Department is thus committed to two inconsistent approaches. One allows sex-based cost averaging; the other does not. Forced to choose between the two approaches, in the first case raising the conflict, the Labor Department opted for the regulation prohibiting sex-based cost averaging. In the court below, it filed a brief specifically relying on 29 C.F.R. §800.151, without addressing the issue of the continued viability of 29 C.F.R. §800.116(d).

But the conflict remains, and must be resolved by this Court. The proper resolution is the one embraced for this case by the Labor Department below, for 29 C.F.R. §800.151 alone accords with the plain meaning of the Equal Pay Act, its legislative history, and its purpose.

Although there was some discussion during the Congressional hearings on the Equal Pay Act concerning hypothesized greater employment costs of women, Congress specifically rejected an amendment offered by Representative Findley that would have allowed a wage differential "which does not exceed ascertainable and specific added costs resulting from employment of the opposite sex" (109 Cong. Rec. 9217). In urging rejection of Representative Findley's proposed amendment, two of the Equal Pay Act's sponsors indicated that while costs might be a factor under the proposed Act, the employer would have to (1) establish that they were measured under a neutral policy, such as absenteeism, applied alike to all employees, "regardless of sex" (Rep. Goodell, 109 Cong. Rec. 9206, 9217) and, in addition, (2) analyze all costs, including any increase in productivity that would offset alleged greater costs (Rep. Thompson, 109 Cong. Rec. 9207).

Similarly, the Senate Labor Committee rejected any *per se* rule setting up a cost defense for all employers based on one element of cost:

> *This question of added cost* resulting from the employment of women is one that *can be only answered by an ad hoc investigation.* Evidence was presented to indicate that while there may be alleged added costs, these were more than compensated for by the higher productivity of women against men performing the same work and that the overall result for the employer

> was a lesser production cost than would result from the hiring of only men. Furthermore, questions can legitimately be raised as to the accuracy of defining such costs as pension and welfare payments as related to sex. [Emphasis added]

S. Rep. No. 176, 88th Cong., 1st Sess. 4 (1963); 109 Cong. Rec. 8915.

29 C.F.R. §800.116(d) does not meet the stringent standard Congress contemplated for a cost defense. The regulation establishes a *per se* rule for all employers and isolates a single cost element, rather than requiring an "ad hoc investigation" as to each employer. It does not require the employer to analyze *all* costs associated with the employment of men and women, including costs that might be higher for men (*e.g.*, lower productivity, higher susceptibility to disabling injury, higher dependents' costs under fringe benefit programs). And it does not call for a neutral policy, under which *both men and women might receive lower pay* for the higher costs attributable to them, "regardless of sex" (*see* 109 Cong. Rec. 9217, Rep. Goodell); rather, it allows employers to pay women less, solely because of their sex.

Moreover, 29 C.F.R. §800.116(d) violates the central purpose of the Equal Pay Act—raising the depressed economic status of women workers. Declaration of Purposes, Equal Pay Act, Section 2(a)(1), 77 Stat. 56; *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970); *Shultz* v. *American Can Co.—Dixie Products*, 424 F.2d 356, 360 (8th Cir. 1970). In contrast, 29 C.F.R. §800.116(d) directly allows employers to provide lower pension benefits for women workers; and, by implication, allows lower take-home wages for women workers.

As Senator Hart said in the debates on the Equal Pay Act:

> We have long passed the time when women were allegedly working for "pin money." Women are working to earn a living, to support families or to contribute to the family's ability to send the children to college —in addition to whatever personal sense of achievement may be involved.
>
> The supermarket does not have a special price on its groceries for women, the doctor does not have a special rate for them, their rent is not based on sex. Why then do we allow a pay differential to continue which gives them a smaller paycheck than others performing the same work?

109 Cong. Rec. 8916 (May 17, 1963). Senator Hart's remarks hold true whether women are current participants in the labor force or retired workers. As the Senate Committee stated in recommending passage of the bill, "The general purchasing power and living standard of workers are adversely affected by discriminatory pay rates." S. Rep. No. 176, *supra*, at 1-2; 109 Cong. Rec. 8914. The purchasing power and living standard of retired women workers, one of the poorest groups in the American economy, Women and Poverty, *supra*, are no less affected by discriminatory pension benefit rates.

In sum, no deference is due 29 C.F.R. §800.116(d) in the context of this case. The Wage and Hour Administrator's interpretation is inconsistent with another Labor Department regulation, and fails to comport with the express language of the Equal Pay Act, its legislative history, and its purpose. "Habit (long-standing among insurers), rather than analysis," appears to account for it. 29 C.F.R. §800.116(d) is not the product of thorough consideration or careful reasoning. It is impossible to harmonize with the general position the Labor Department takes against sex averaging. In short, it reflects none of the factors that give an interpretive ruling "power to persuade."

4. EEOC's Guidelines on Pension Plans Are Entitled to Deference.

The EEOC guidelines on discriminatory retirement plans provide, in relevant part:

> It shall be an unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex.

29 C.F.R. §1604.9(f). The guidelines further provide:

> It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.

29 C.F.R. §1604.9(e).

These guidelines constitute a single, comprehensive, logically-consistent position which fully implements the grand design of Congress in passing and amending Title VII. They suffer none of the defects of the Wage and Hour ruling discussed in the preceding section, nor any of the flaws the EEOC pregnancy guidelines exhibited. Under the *Skidmore* standard set out in *Gilbert*, they possess "power to persuade."

In *Gilbert*, this Court declined to follow a portion of the EEOC pregnancy guidelines in part because the posi-

tion espoused was not a contemporaneous interpretation of Title VII and was contradicted by an earlier Commission position.[47] The Commission's pension plan guidelines, however, are in accord with its earliest position on the issue. Thus, on January 26, 1966—just seven months after Title VII's effective date[48]—the Commission issued a decision finding reasonable cause to believe a sex-discriminatory pension plan violated Title VII. *Rosen* v. *Public Service Electric & Gas Co.*, 409 F.2d 775, 777 and n. 8 (3d Cir. 1969) (quoting the Commission decision). The plan discriminated against men by giving male early retirees smaller benefits than identically-situated female early retirees, solely on the basis of sex. It discriminated against women by forcing them to retire five years earlier than men, solely on the basis of sex. These two policies—differences based on sex in benefits or retirement ages—are precisely the policies forbidden under the Commission's guidelines. 29 C.F.R. §1604.9, 37 Fed. Reg. 6836 (April 5, 1972). *See also* 29 C.F.R. §1604.31(a), 33 Fed. Reg. 3344 (Feb. 24, 1968).[49]

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[47] *But cf. Nashville Gas Co.* v. *Satty*, 46 U.S.L.W. 4026 (Dec. 6, 1977).

[48] Title VII became effective on July 2, 1965. Pub. L. 88-352, §716(a).

[49] This earlier guideline provided:

(a) A difference in optional or compulsory retirement ages based on sex violates Title VII.

(b) Other differences based on sex, such as differences in benefits for survivors, will be decided by the Commission by the issuance of Commission decisions in cases raising such issues.

33 Fed. Reg. 3344 (Feb. 24, 1968).

Nor has the Commission taken inconsistent positions on sex-discriminatory retirement plans.[50] Indeed, it has issued a steady stream of decisions declaring inconsistent with Title VII both retirement age and benefit differentials based on sex. *See* quoted Decision, *Rosen, supra* (1-26-66) (age and benefits); Case No. YNY 9-034, CCH EEOC Decisions ¶6050 (6-16-69) (age and benefits for survivors); Case No. YNY 9-027, 1 FEP Cases 921 (7-3-69) (age); Decision No. 70-45, CCH EEOC Decisions ¶6041, 2 FEP Cases 166 (7-18-69) (age); Decision No. 70-75, CCH EEOC Decisions ¶6049, 2 FEP Cases 227 (8-13-69) (age); Decision No. 70-706, CCH EEOC Decisions ¶6149, 2 FEP Cases 684 (4-20-70) (age); Decision No. 71-562, CCH EEOC Decisions ¶6184, 3 FEP Cases 233 (12-4-70) (age and benefits); Decision No. 71-1102, CCH EEOC Decisions ¶6200, 3 FEP Cases 271 (12-31-70) (age); Decision No. 71-1580, 3 FEP Cases 812 (4-8-71) (age and benefits for survivors); Decision No. 72-0702, CCH EEOC Decisions ¶6320, 4 FEP Cases 316 (12-27-71) (age); Decision No. 72-1919, CCH EEOC Decisions ¶6370, 4 FEP Cases 1163 (6-6-72) (benefits); Decision No. 74-118, 2 CCH EPG ¶6431 (4-26-74) (benefits); Decision No. 75-020, 11 FEP Cases 1496 (9-4-74) (benefits); Decision No. 75-147, CCH EEOC Decisions ¶6447, 11 FEP Cases 1486 (1-13-75) (age and benefits).

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[50] Some amici cite a July 1966 opinion letter of an EEOC General Counsel adopting the general approach of 29 C.F.R. §800.116 (d). This isolated opinion of a General Counsel does not have the same status as decisions or regulations issued by the full Commission, and indeed was directly contrary to the prior Commission guidelines, still in effect in July 1966, which listed the Equal Pay Act regulations EEOC would follow as 29 C.F.R. §*800.119-800.163* (thereby specifically excluding 29 C.F.R. §800.116(d)). *See* 29 C.F.R. §1604.7(b), 30 Fed. Reg. 14928 (Dec. 2, 1965), discussed at p. 62 *infra*. Finally, the General Counsel opinion is no longer published, and has not been cited or discussed in any previous case.

Some amici have tried to construct a change in EEOC's position on retirement plans from an earlier Commission regulation on the effect of the Bennett Amendment, 29 C.F.R. §1604.7, 30 Fed. Reg. 14928 (Dec. 2, 1965). However, in this early regulation, the Commission specifically declined to follow the Labor Department regulation set forth at 29 C.F.R. §800.116(d):

> . . . the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. These interpretations are found in 29 Code of Federal Regulations, *Part 800.119-800.163.* [Emphasis added]

29 C.F.R. §1604.7(b). Since the Commission never deferred to 29 C.F.R. §800.116(d), its issuance of a series of decisions and guidelines over the years, all disapproving sex-based lines in retirement plans, whatever the proffered rationale, surely demonstrates consistency, not a change in position. The Commission elaborated and formalized its position over the years; it did not change that position. Thus, the Commission's position on discriminatory retirement plans reflects and builds upon EEOC's early construction of the Act, and exhibits none of the inconsistencies that shroud the Labor Department regulations. Deference is therefore due to EEOC's informed judgment.

In conclusion, the Bennett Amendment provides no refuge for the Water Department or its insurance industry amici. It supplies no defense to a discriminatory wage policy explicitly based on "gender as such." Of the two conflicting Labor Department regulations pertinent to this case, only 29 C.F.R. §800.151 is entitled to deference; it

alone conforms to the express language and purpose of the Equal Pay Act. Finally, the EEOC guidelines on pension plans are fully entitled to deference. They embody a single, comprehensive, logically-consistent position anchored solidly to the purpose of Title VII—that women should not be pigeonholed or lumped together because of their sex, nor should they be deprived "of protection for [themselves and] their families which men receive as a result of their employment." *Goldfarb, supra.*

II.

The decision below accords with this Court's principal equal protection/gender classification decisions.

Sex-averaging arguments strikingly similar to those pressed here were firmly rejected in last Term's principal equal protection/gender classification decisions, *Craig* v. *Boren,* 429 U.S. 190 (1976), and *Califano* v. *Goldfarb,* 430 U.S. 199 (1977). Those decisions may well be "a useful starting point in interpreting [Title VII]." *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 133 (1976). Indeed, to the extent Title VII calls for review more stringent than the Constitution requires, *see Washington* v. *Davis,* 426 U.S. 229 (1976), the rulings in *Craig* and *Goldfarb* should make this an *a fortiori* case.

In *Craig* v. *Boren,* the statute at issue, prohibiting sale of beer to 18–21-year-old boys, was intended to foster traffic safety. Just as death dates for most people are not predictable in advance, so there was "no apparent way to single out persons likely to drink and drive." 429 U.S. at 227 (Rehnquist, J. dissenting). Therefore, Oklahoma used

sex as a proxy. Based on statistics indicating "young males pose by far the greater drunk driving hazard, both in terms of sheer numbers and in terms of hazard on a per-driver basis," 429 U.S. at 226 (Rehnquist, J. dissenting), the State permitted girls to purchase beer at an earlier age than boys.

The Court acknowledged that the statistical disparities shown in *Craig* were "not trivial." Nonetheless, given the elevated level of scrutiny appropriate to sex-based differentials, the Court held Oklahoma's statistical analyses "hardly can form the basis for employment of a gender line as a classifying device." 429 U.S. at 201.[51]

Califano v. *Goldfarb* further developed the point made in *Craig*, that gender, like race, must not be used as a proxy for some other characteristic, attribute or condition. *Goldfarb* involved the Social Security Act's resort to the gender label "widow" as a surrogate for "surviving dependent spouse." An unusually high correlation between gender and the trait gender purported to represent was advanced in *Goldfarb*. As Justice Rehnquist, in dissent, calculated, the correlation was approximately 90 percent. 430 U.S. at 238 n.7. The 90 percent "fit" urged in *Goldfarb* was rejected by the Court as justification for use of a sex

[51] Justice Rehnquist's dissenting opinion justifies a permissive approach to sex classification in the *Craig* setting, in substantial part, on the ground that only classifications *disadvantaging women* require, under the Court's precedent, "elevated" scrutiny. 429 U.S. at 219. Here, we have such a classification. Though most women and men live the same length of time, *i.e.*, the vast majority of men and women born the same year may be paired by death age, *see I.A. supra*, sex-averaging yields a distinct advantage to the male pensioner and a distinct disadvantage to the female pensioner.

criterion. In contrast, the classification here misfits some 84 percent of the affected population.

In sum, the classification in controversy is "based upon gender as such," *Geduldig* v. *Aiello*, 417 U.S. 484, 496 n.20 (1974); there is at best a highly imperfect congruence between gender and the trait at issue; decisions "analyzing and discussing"[52] categorization by gender in an equal protection context cast in grave doubt the brand of sex averaging practiced by petitioner Water Department.[53] Given these factors, the Title VII result should be apparent: under the close review Congress commanded, the Water Department's policy, ranging men and women in two separate lines, must fall.

[52] *See General Electric Co.* v. *Gilbert*, 429 U.S. 125, 133 (1976).

[53] Amici TIAA-CREF (Brief at 18) misread this Court's 1971-1977 precedent. In none of the cases TIAA-CREF cite did the Court assert the absence of "any basis in fact" for the classification. On the contrary, the proposition in *Reed* v. *Reed*, 404 U.S. 71 (1971), that men have more business experience than women, had ample empirical support. In *Frontiero*, 411 U.S. 677 (1973), *Wiesenfeld*, 420 U.S. 636 (1975), and *Goldfarb*, 430 U.S. 199 (1977), statistics tendered by the Government fully documented men's non-dependency and their labor-market orientation. And it is ludicrous to suggest that this Court relied upon any potential for individualized testing of beer drinking capacity in reaching its decision in *Craig* v. *Boren*, 429 U.S. 190 (1976).

III.

Congressional authority under Section 5 of the Fourteenth Amendment and the Commerce Clause plainly supports application of Title VII's ban on sex classification to the case at bar.

Petitioners' constitutional argument (Brief at 37-46) are framed in utter disregard of the legislative history of the 1972 amendments to Title VII, and this Court's relevant precedent. In extending the coverage of Title VII, Congress asserted its authority under both the Commerce Clause and Section 5 of the Fourteenth Amendment. *See, e.g.,* S. Rep. No. 92-415, 92d Cong., 1st Sess. 11 (1971). Congressional intent was expressed explicitly: the amendments bringing governments, government agencies and political subdivisions within Title VII were designed to afford to public employees "the same benefits and protections in equal employment as the employees in the private sector of the economy." S. Rep. No. 92-415, 92d Cong., 1st Sess. 9 (1971).

Beyond question, the post-Civil War amendments enlarge the powers of Congress, *Fitzpatrick* v. *Bitzer,* 427 U.S. 445, 454 (1976), make Congress, not the judiciary, the chief guardian of protected rights, *Ex parte Virginia,* 100 U.S. 339, 345 (1879), and permit legislation independent of a judicial finding that official action denies equal protection of the laws. *Compare South Carolina* v. *Katzenbach,* 383 U.S. 301, 333-34, 337 (1966), *with Lassiter* v. *Northhampton County Bd. of Elections,* 360 U.S. 45 (1959). It is for Congress to decide what legislation is necessary and proper in the exercise of its powers under either the Commerce

Clause or Section 5 of the Fourteenth Amendment, and the congressional choice of appropriate means for exercising those powers—so long as the selected means are not elsewhere prohibited by the Constitution—should not be overturned by the judiciary. *McCulloch* v. *Maryland,* 4 Wheat. 316, 421 (1819); *Katzenbach* v. *Morgan,* 384 U.S. 641, 650 (1966). "Attributes of [state] sovereignty" insulated from federal interference under this Court's decision in *National League of Cities* v. *Usery,* 426 U.S. 833 (1976), surely do not include the prerogative to discriminate on the basis of sex. *See, e.g., Usery* v. *Allegheny County Institution District,* 544 F.2d 148 (3d Cir. 1976), *cert. denied,* 430 U.S. 946 (1977); *Usery* v. *Bettendorf Community School District,* 423 F. Supp. 637 (S.D. Iowa 1976). *See generally* Calhoun, The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Discrimination, 61 Minn. L. Rev. 313 (1977).

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

RUTH BADER GINSBURG
SUSAN DELLER ROSS
KATHLEEN WILLERT PERATIS
MARJORIE MAZEN SMITH
BRUCE J. ENNIS
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

MATTHEW W. FINKIN
General Counsel
American Association of
University Professors
Southern Methodist
University School of Law
Dallas, Texas 75275

Attorneys for the American Civil Liberties Union Foundation and the American Association of University Professors as Amicus Curiae

December, 1977

APPENDIX

Order

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 670165

MILDRED PETERS, *et al.*,

Plaintiffs,

—v.—

WAYNE STATE UNIVERSITY, *et al.*,

Defendants.

ORDER

Defendant having filed a motion for summary judgment and it appearing to the court that plaintiffs contend that their proofs will demonstrate that the defendant's use of mortality tables to administer its retirement program affords women lower benefits than men and, therefore, is discriminatory and violative of Title VII of the 1964 Civil Rights Act; and it further appearing that plaintiffs assert that appropriate statistical data will demonstrate that while generally women may die later than men, working women do not have greater longevity than working men and further that although the average non-working woman may live longer, most women and men live the same length of time; and it further appearing that plaintiffs also seek to demonstrate that defendant may use other non-discriminatory life expectancy predictors in the administration of its retirement program, namely, health, smoking or other com-

mon characteristics; and it further appearing that plaintiffs herein are entitled to develop these factual issues in support of their theory of discriminatory effect precluding disposition on summary judgment; and it further appearing to the court that neither the Bennett Amendment nor *General Electric Co.* v. *Gilbert,* 429 U.S. 125 (1976) requires disposition of the factual issues on summary judgment;

Accordingly, IT IS ORDERED that defendant's motion for summary judgment be and the same hereby is denied.

/s/ ROBERT E. DEMASCIO
Robert E. DeMascio
United States District Judge

Dated: September 21, 1977